CHONG PIK SING & ANOR.

v.

NG MUN BEE & ORS.

FEDERAL COURT, KUALA LUMPUR
GEORGE SEAH FJ
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 55 OF 1984]
2 FEBRUARY 1985

TORT: *Fatal Accident - Claim - Quantum of damages - Whether can claim for loss of consortium - Claim for pecuniary loss - Loss of services gratuitously rendered - Multipliers.*

This appeal raises two main issues. The first relates to the right of a husband in a fatal accident suit to claim for loss of consortium of a wife who was killed in a motor accident caused by the negligent act or omission by the appellants. The second question concerns the quantum of general damages awarded to the husband and the three children by the learned Judge. At the time of the accident, the husband was 35 years old and the children's ages ranged from 7 to 2. The learned Judge had used a multiplier of 3 in the case of the husband and a multiplier of 11 in the case of the children.

Held:

[1] The learned Judge was wrong to make an award for damages for loss of consortium to the husband under sub-section (3) of s. 7 of the Civil Law Act 1956. Such an award would appear to be contrary to the authorities and the law. Under s. 2 of Lord Campbell's Act which is in *pari materia* with s. 7 of the Civil Law Act 1956, it is established that only injuries capable of evaluation in monetary terms can be found claims for damages, and that losses which cannot be assessed in monetary terms cannot support a claim for damages under the Act.

[2] The learned Judge was right to make an award for damages under pecuniary loss suffered by the husband through the death of his wife by the negligent act or omission of the appellants which comprised of loss of services which the wife had gratuitously rendered for him. However, the learned Judge was wrong in allowing a pecuniary loss very much in excess of the sum claimed.

[3] The best way of assessing the husband's or the children's damages in such cases is to estimate the net pecuniary loss upon a monthly or yearly basis and then to apply a suitable or different multipliers to it.

[4] The learned Judge rightly took into consideration the husband's prospects of remarrying in the near future and having regard to all the circumstances of the case, the learned Judge had adopted a reasonable multiplier. On the other hand, the single multiplier used for the three children, whose ages ranged from 7 to 2 at the time of the death of their mother was inordinately high inasmuch as the basis of the claim comprised of loss of services gratuitously performed by the deceased as mother when the children were too young to fend for themselves. The learned Judge was wrong to use a multiplier of 11 years to assess the post-trial loss for all the three children as the three children would not all be solely dependent on their mother for the whole period of 11 years.

[Award for loss of consortium set aside. Funeral expenses at agreed sum allowed.]

Cases referred to:
Franklin v. The South Eastern Ry. Co. [1858] 157 ER Exch 448
Taff Vale Ry. Co. v. Jenkins [1913] AC 1
Davies v. Powell Duffryn Associated Colleries Ltd. [1942] AC 601
Hay v. Hughes [1975] 1 QB 790
Berry v. Humm & Co. [1915] 1 KB 627
Jeffery v. Smith [1970] 114 SJ 218
Regan v. Williamson [1976] 1 WLR 305
Jamil bin Harun v. Yang Kamsiah binti Meor Rasdi & Ors. [1984] 1 CLJ (Rep) 11
Kassam v. Kampala Aerated Water Co. [1965] 2 All ER 875
Lai Wee Lian v. Singapore Bus Service (1978) Ltd. [1984] 1 MLJ 325; [1984] 1 CLJ (Rep) 11

Legislation referred to:
Civil Law Act 1956, ss. 7, 7(3), (4)
Fatal Accidents Acts 1846-1908 [UK], s. 2(2), (3), (4)

For the appellants - S. Kanagasabapathi; M/s. R.K. Nathan & Co.
For the respondents - David Tay; M/s. Murphy & Dunbar

JUDGMENT

George Seah FJ:

This is an appeal by the defendants and it raises two main issues. The first relates to the right of a husband in a fatal accident suit to claim for loss of consortium of a wife who was killed in a motor accident caused by the negligent act or omission of the defendants. Consortium may be regarded as the right of one spouse to the company, assistance, affection and companionship of the other and in the Court below the learned Judge awarded the sum of RM3,000 under this head.

In addition the learned Judge allowed damages for loss of services suffered by the husband and the children of the marriage. There was no appeal or cross-appeal against this head of damages but the amount of the award is disputed by the defendants and will be dealt with separately in the later part of the judgment.

It is common ground that this action is brought under the provisions of s. 7 of the Civil Law Act 1956 which are in *pari materia* with the English Fatal Accidents Acts 1846-1908 commonly known as Lord Campbell's Acts. The wordings in s. 2 of the 1846 Act are substantially the same as those in sub-sections (2), (3) and (4) of our Act and for the purpose of this appeal, we need only to refer to sub-section (3) and the relevant part reads:

> In every such action the Court may give such damages as it thinks fit proportioned to the loss resulting from the death to the parties respectively for whom and for whose benefit the action is brought.

Dealing with the 1846 Act in *Franklin v. The South Eastern Ry. Co.* [1858] 157 ER Exch 448 @ 449 Pollock CB said:

> The statute does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what it does, is to show what it does not, mean. Now it is clear that damage must be shown, for the jury are to "give such damages as they think proportioned to the injury". It has been held that these damages are not to be given as a solitium; but are to be given in reference to a pecuniary loss. That was so decided for the first time in banc, in *Blake v. The Midland Ry. Co.* 18 QB 93 or 118 ER KB 35 ...

Some fifty-five years later in the case of *Taff Vale Ry. Co. v. Jenkins* [1913] AC 1 @ 4 Viscount Haldane LC said:

> The action is brought under Lord Campbell's Act ... Now we have heard a good deal of authority cited as to what the foundation of such an action is, but I do not think there is much difficulty in coming to a conclusion as to the principle which underlies those authorities. The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss ...

Speaking of Lord Campbell's Act Lord Wright in *Davies v. Powell Duffryn Associated Colleries Ltd.* [1942] AC 601 @ 611 said:

> ... The Act 1846, s. 2 provides that the action is to be for the benefit of the wife or other member of the family, and the jury (or Judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value ...

Then at p. 617 the Law Lord continued:

> There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities ...

In the year 1975 and sitting in the Court of Appeal in the case of *Hay v. Hughes* [1975] 1 QB 790 Lord Edmund-Davies reiterated the principle which has emanated from the House of Lords in the following words at p. 802:

> While it is undoubtedly established that damages can be awarded under the Fatal Accidents Acts only in respect of pecuniary loss and not as a solatium for injured feelings (see *Taff Vale Ry. Co. v. Jenkins* [1913] AC 1 at p. 4 per Viscount Haldane LC and *Davies v. Powell Duffryn Associated Colleries Ltd.* [1942] AC 601 at p. 617 per Lord Wright) ...

In other words, it has been established by these authorities in interpreting s. 2 of Lord Campbell's Act that only injuries capable of evaluation in monetary terms can be found claims for damages under the 1846 Act, and that losses which cannot be assessed in monetary terms cannot support a claim for damages under that Act.

Applying this to the facts herein we are of the opinion that the learned Judge was wrong to make an award for damages for loss of consortium to the husband under sub-section (3) of s. 7 of the Civil Law Act 1956. In our judgment, such an award would appear to be contrary to the authorities and the law. On the other hand, it has been held that the loss need not be a monetary loss: a loss of services rendered by the wife and capable of being valued in pecuniary terms will suffice, such as housekeeping (see *Berry v. Humm & Co.* [1915] 1 KB 627; *Jeffery v. Smith* [1970] 114 SJ 218; *Hay v. Hughes (supra)* and *Regan v. Williamson* [1976] 1 WLR 305). It follows that in practice the pecuniary loss suffered by a husband through the death of his wife by a negligent act or omission of the defendants is usually comprised of loss of services which the wife had gratuitously rendered for him. In our judgment, the learned Judge was right to make an award for damages under this head.

The second question concerns the quantum of general damages awarded to the husband and the three children by the learned Judge. It would appear that the amount awarded to the husband was RM45,589 made up (a) RM29,250 as pre-trial loss and (b) RM16,339 as post-trial loss. For the children the total damage was RM44,529 consisted of (i) pre-trial loss of RM14,625 and (ii) post-trial loss of RM29,903 respectively.

Probably the best way of assessing the husband's or the children's damages in such cases is to estimate the net pecuniary loss upon a monthly or yearly basis and then to apply a suitable or different multipliers to it. This seems to me the method adopted by the learned Judge in this case. Learned counsel for the defendants did not complain about the approach used by the learned Judge; he submitted however, that the total sum awarded was grossly excessive in that the learned Judge had misapprehended the facts and the law and had therefore come to an erroneous award.

Firstly, it was contended by learned counsel for the defendants that under the present law, husband and/or children who are dependents of a deceased wife or mother are to be compensated only for the value of the services lost. A wife's companionship is to be disregarded, likewise the grief and misery caused by her death and so too, a mother's love, guidance and influence in bringing up the children (per Lord Edmund-Davies in *Hay v. Hughes* (*supra*) and *Regan v. Williamson* (*supra*)). This matter has in fact been dealt with in the earlier part of the judgment. But in dealing with the husband's claim the learned Judge said at p. 25-26 of the Record:

> ... loss of services must be confined generally to the first plaintiff's (husband) loss in the caring of his needs in the house such as the loss in the enjoyment of his wife's cooking **and other wifely duties that are more or less taken for granted and for which there can be no substitute** ...

We are unable to comprehend the words which we have underlined. It seems that the learned Judge had inadvertently and mistakenly fallen into error by taking loss of consortium into account when she ought to have ignored it when considering a claim by a husband for the death of his wife by a negligent act or omission. This she is not allowed to do under the provisions of sub-section (3) of s. 7 of the Civil Law Act 1956 as expounded by the various authorities which we have cited earlier.

Next, it was submitted by learned counsel for the defendants that in the statement of claim, the husband on behalf of himself and the children, pleaded that they had been deprived of the loss of consortium and services of the deceased wife and mother which was valued at the sum of RM500 per month and still continuing. On this form of pleading it was contended that the defendants were entitled to assume the claim would be limited to RM500 each month and that the continuing loss would also be of the same amount. However, at the trial attempt was made to prove that the husband had been paying to his mother-in-law the sum of RM800 each month towards the support and maintenance of the three children. The mother-in-law was not called as a witness and her absence had not been properly accounted for. Nor did the husband give evidence as to his average monthly earnings for the past years.

Despite all these shortcomings the learned Judge appeared to have accepted his testimony and estimated the value of the loss of services rendered gratuitously by the deceased wife and mother at RM800 per month and apportioned RM500 to the husband and RM300 to the three children. It was argued by learned counsel for the defendants that such a finding would be against the rules of pleading. There is much force in this submission. In our opinion, the learned Judge erred in allowing a pecuniary loss very much in excess of the sum claimed.

Lastly, complaint was made against the multipliers adopted by the learned Judge in assessing the pecuniary losses of the husband and the three children. It was submitted by learned counsel for the defendants that in applying a multiplier of 3 years for the husband and 11 years for the children in quantifying post-trial losses in addition to the 58 ½ months damages of pre-trial losses, the learned Judge had failed to consider the principle of overlapping. In short, it was argued that the learned Judge appeared to have used a multiplier of 7 years and 10 months and 15 years and 10 months in calculating the pecuniary losses of the husband and children respectively. It was contended that such a multiplier was grossly excessive and thereby vitiated the award.

Now, the husband was 35 years old when his wife was killed in a motor accident on 10 March 1979. At the trial which took place in early 1984 (some 5 years later) he was still a widower. The learned Judge rightly took into consideration his prospects of remarrying in the near future and having regard to all the circumstances of the case, she adopted a multiplier of three years in assessing post-trial loss. We think this was a reasonable multiplier and since learned counsel for the defendants had failed to demonstrate that the learned Judge had erred in law we see no valid reason to disagree with this finding.

On the other hand, we agree with the contention of learned counsel for the defendants that the single multiplier used for the three children, whose ages ranging from 7 to 2 at the time of the death of their mother and who are about 12 and 7 years old at the trial, was inordinately high inasmuch as the basis of the claim comprised of loss of services gratuitously performed by the deceased as mother when the children were too young to fend for themselves.

For the above reasons we now proceed to assess the damages based on the evidence adduced before the Court below. We would like first of all to deal with the net monthly pecuniary loss suffered by the husband and the children.

In his statement of claim a sum of RM500 per month and still continuing for loss of services of the deceased was asked for. These consisted primarily of marketing, cooking and taking care of the children. Washing and cleaning were being performed by a daily help. Using local knowledge and conditions (see *Jamil bin Harun v. Yang Kamsiah binti Meor Rasdi & Ors.* [1984] 1 CLJ (Rep) 11) in our opinion, nowaday, it would probably cost in the region of RM500 per month to employ a domestic servant to perform the services which had been gratuitously rendered by the deceased. Learned counsel for the defendants concedes that this seems a fair and reasonable sum to pay for such services. And we would apportion the sum of RM300 to the husband and RM200 to the three children. Since we agree that a multiplier of 3 to be a reasonable one in quantifying the post-trial loss of the husband we need only have to apply a suitable multiplier in calculating the post-trial loss of the three children. Before we do that we would set out briefly the relevant facts. At the time of the death of their mother on 10 March 1979 the eldest daughter was 7 years old, the second daughter was 5 and the youngest son was 2 years of age. So at the trial in January 1984 they were 12, 10 and 7 years old respectively. The learned Judge used a multiplier of 11 years to assess the post-trial loss notwithstanding that the ages of the children vary from 12 to 7. This was plainly wrong as the three children would not all be solely dependent on their mother for the whole period of eleven years because after attaining their eighteenth birthdays the two elder daughters would be self-supporting, would probably get employment or even get married. In fact, only the youngest son would be dependent for the whole eleven years (*see Kassam v. Kampala Aerated Water Co.* [1965] 2 All ER 875). Taking these matters

into consideration, coupled with the vicissitudes of life and the fact that a lump sum is being paid in advance, we would adopt a multiplier of 8 for the purpose of calculating the post-trial loss of the three children.

It follows that the award of damages will be as follows:

For the husband

(a) pre-trial loss at RM300 p.m. for 58 ½ months	...	RM17,550
(b) post-trial loss at RM300 p.m. for 3 years	...	RM10,800
		RM28,350

For the three children

(a) pre-trial loss at RM200 p.m. for 58 ½ months	...	RM11,700
(b) post-trial loss at RM200 p.m. for 8 years	...	RM19.200
		RM30,900

It was contended by learned counsel for the husband and the children that in computing the post-trial loss a direct multiplier should be used instead of applying the Annuity Table. Learned Counsel appears to rely on a recent decision of the Privy Council in the case of *Lai Wee Lian v. Singapore Bus Service* (1978) Ltd. [1984] 1 MLJ 325 following an appeal from the Singapore High Court for this proposition. It is common ground that the Annuity Table has frequently been used by the Courts in Malaysia in calculating the general damages and since the matter was not raised in the Court below and as no cross-appeal had been lodged we do not allow this ground to be raised in this appeal. It is therefore not necessary to decide this precise point here but we desire to hold ourselves free to deal with it when it arises at some future date.

As liability was only admitted by the defendants to the extent of fifty per cent only, the award would accordingly be reduced by one-half, viz. RM14,175 to the husband and RM15,450 to the children respectively. Pursuant to s. 7 (4) of the Civil Law Act 1956 we would apportion the award of the three children in the manner following:

(i) as to the eldest daughter, Ng Mei Ling	...	RM2,575
(ii) as to the second daughter, Ng Mei Ching and	...	RM5,150
(iii) as to the youngest child, Ng Chong Lai	...	RM7,725

We order that the award of the three children be paid to the Public Trustee to be held on trust for them in the usual terms.

In accordance with the provisions of s. 11 of the Civil Law Act 1956 we would award interest at the rate of 3% per annum from date of issue of the Writ to date of judgment in respect of the award relating to pre-trial loss only. For these reasons we would allow the appeal and substitute for the Order made by the Court below the following:

For the husband

(a) pre-trial loss	... RM8,775	
(b) post-trial loss	... RM5,400	... RM14,175

For the three children

(a) pre trial loss	... RM5,850	
(b) post-trial loss	... RM9,600	... RM15,450

The award of RM4,000 for loss of consortium is hereby set aside. And funeral expenses being agreed at the sum of RM1,500 is allowed. It is ordered that the defendants are entitled to their costs in this appeal to be taxed. Deposit to be refunded to them forthwith.

Also found at [1985] 1 CLJ 332